85-402

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

NORMAN EUGENE AWREY,
Petitioner,

-vs-

PROGRESSIVE CASUALTY INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMIT SUCH MANIFEST ERROR THAT ITS DECISION SHOULD BE REVERSED, WHERE IT EXPLICITLY RELIED ON A CASE FROM THE MICHIGAN COURT OF APPEALS WHICH HAD NO PRECEDENTIAL VALUE, BECAUSE:

(A) THE MICHIGAN SUPREME COURT HAD GRANTED LEAVE TO APPEAL THAT CASE;

(B) UNDER MICHIGAN LAW, ONCE LEAVE IS GRANTED, THE MICHIGAN COURT OF APPEALS' OPINION IS WITHOUT PRECEDENTIAL AUTHORITY UNTIL THE MICHIGAN SUPREME COURT AFFIRMS OR OTHERWISE APPROVES THE LOWER COURT DECISION; AND

(C) THE STIPULATED DISMISSAL OF THE APPEAL PRECLUDED THE AFFIRMANCE OR ANY ALTERNATIVE APPROVAL OF THE LOWER COURT OPINION?

LIST OF PARTIES

All parties to this cause of action are named in the caption. The parties are represented as follows:

1. NORMAN EUGENE AWREY.
   Lawfirm: Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick.
   By: Richard E. Shaw (P33521).

2. PROGRESSIVE CASUALTY INSURANCE COMPANY.
   Lawfirm: Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.
   By: D. J. Watters (P22042) & John P. Jacobs (P15400).

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No. _____

In The

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-vs-

PROGRESSIVE CASUALTY
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Respondent.

PETITION FOR A WRIT OF CERTIORARI

REPORTS BELOW

1. *Awrey* v. *Progressive Casualty Co*, 728 F.2d 352 (CA 6, 1984) (Appendix, A-2).
2. Opinion (of the trial court *re:* Defendant's Motion for Judgment Notwithstanding the Verdict or for New Trial) (Appendix, A-15).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Sixth Circuit decided and filed its Opinion on February 28, 1984. A Motion for Rehearing and/or Certification to the Michigan Supreme Court was filed on March 20, 1984. A Motion to File Instanter was also filed on March 20, 1984.

The U. S. Court of Appeals granted the Motion to File Instanter on February 7, 1985.

On June 3, 1985, the Motion for Rehearing and/or Certification to the Michigan Supreme Court was denied. The mandate was issued on June 11, 1985. An order denying motion to recall mandate was entered on June 26, 1985.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

No constitutional provisions, treaties, statutes, ordinances or regulations are applicable to this petition.

STATEMENT OF THE CASE

Petitioner, Mr. Norman Eugene Awrey, was involved in an automobile accident. Thereafter, he was named as a defendant in an automobile negligence action. Mr. Awrey was insured by respondent, Progressive Casualty Insurance Company, with policy limits of $20,000.

There was no settlement of the aforementioned automobile negligence action. The jury returned a verdict against Mr. Awrey for $175,000.

This appeal concerns Mr. Awrey's action against Progressive Casualty, based upon Mr. Awrey's contention that Progressive Casualty acted in "bad faith" in failing to settle the underlying case in a timely manner for policy limits.

Mr. Awrey filed a complaint in the Circuit Court for Wayne County, State of Michigan. Progressive Casualty

filed a petition for removal in the United States District Court, Eastern District of Michigan, Southern Division, on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332.

Upon trial, a jury returned a verdict in favor of Mr. Awrey, and a judgment to that effect was entered on March 23, 1982. Progressive Casualty filed and the trial court denied a Motion for Judgment Notwithstanding the Verdict or for New Trial. An order to that effect was entered on April 21, 1982.

A Notice of Appeal was filed on May 17, 1982.

Progressive Casualty filed its Brief on Appeal on approximately February 21, 1983. It contended, *inter alia*, that the trial court's judgment should be reversed on the basis that Progressive Casualty's conduct did not constitute "bad faith".

On July 6, 1983, the Michigan Court of Appeals released *Medley* v. *Canady*, 126 Mich App 739, 337 N.W.2d 909 (1983), *lv granted* 419 Mich 870 (1984).

On July 22, 1983, an Application for Leave to Appeal was filed in *Medley* v. *Canady, supra*, with the Michigan Supreme Court.

On approximately October 25, 1983, Progressive Casualty called *Medley* v. *Canady, supra*, to the U.S. Court of Appeals' attention.

On February 28, 1984, the U.S. Court of Appeals decided and filed its Opinion in this case, relying on *Medley* v. *Canady, supra*. The Court held that Michigan law requires that "bad faith" be defined as "a dishonest purpose or moral obliquity." Opinion at A-8. The Court noted that *Medley* involved the definition of bad faith in the context of Michigan's Uniform Trade Practices Act, M.C.L. 500.2006(4); M.S.A. 24.12006(4). The Court con-

cluded that "bad faith" bears the same definition, whether in the statutory context or in a common law "failure to settle" context. Footnote 2, Opinion at A-8.

On March 20, 1984, Mr. Awrey filed a Motion for Rehearing and/or Certification to the Michigan Supreme Court, together with a Motion to File Instanter. The Motion to File Instanter was granted. On May 17, 1984, the Michigan Supreme Court granted leave to appeal *Medley, supra*. The U.S. Court of Appeals was so informed.

On September 10, 1984, the Michigan Court of Appeals released *Commercial Union Insurance Co.* v. *Liberty Mutual Insurance Co.*, 137 Mich App 381, 357 N.W.2d 861 (1984). The Michigan Court of Appeals explicitly restricted *Medley, supra*, to its facts, holding that *Medley*'s definition of bad faith applies only in the context of M.C.L. 500. 2006(4); M.S.A. 24.12006(4). This case was made known to the U.S. Court of Appeals.

The appeal in *Medley, supra*, was dismissed, by stipulation of the parties, on December 18, 1984, that case having been settled. The U.S. Court of Appeals was so informed.

The U.S. Court of Appeals denied the motion for reconsideration on June 3, 1985.

Mr. Awrey's case has been resolved on the basis of *Medley, supra*. However, at the time the U.S. Court of Appeals wrote its opinion, *Medley* was of no precedential weight in Michigan. At the time the U.S. Court of Appeals issued its order denying a rehearing, *Medley* continued to have no precedential authority and had been so limited as to have no applicability to this case. Petitioner submits that the U.S. Court of Appeals' error is manifest, and that its opinion should be reversed.

REASONS FOR GRANTING WRIT

The U.S. Court of Appeals is, of course, mandated to follow state law in a diversity action. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). In this action, the Court of Appeals entirely neglected fundamental Michigan law, regarding the nature of precedential authority. Thus, the Court of Appeals' opinion, which purportedly reflects Michigan law, demonstrates an unconscionable failure to follow that most fundamental rule of law regarding diversity cases, that the state law must govern. *Erie, supra*. Petitioner submits that this petition presents an issue of the utmost significance. The lower federal courts must be alerted to the necessity of strictly following state law regarding the precedential value of published cases. Without such an exhortation, there is the very real danger of lower federal courts paying lip service to the principles of *Erie*, while failing to follow state law, based on a failure to carefully inquire into the sources of precedential authority in the relevant local jurisdiction. This petition presents a dramatic example of a lower court's failure to scrutinize Michigan's law regarding precedential authority. The lower court decision distorts Michigan law. Reversing that decision will accomplish the goal of alerting the federal bar of the requirement that it carefully adhere to local law regarding precedential authority.

In reversing the trial court, the Court of Appeals explicitly determined that the trial court committed no error. The Court of Appeals relied on the newly-released Michigan Court of Appeals' decision, *Medley* v. *Canady*, 126 Mich. App. 739, 337 N.W.2d 909 (1983), *lv granted* 419 Mich. 870 (1984). The Court of Appeals stated, Opinion at A-7, A-8:

> "In reversing the District Court, we do not hold that the trial judge committed error in

> denying Progressive a judgment notwithstanding the verdict. After the District Court's decision was entered, the Michigan Court of Appeals decided the case of *Medley* v. *Canady*, 126 Mich. App. 739, 337 N.W.2d 909 (1983), clarifying what is required to prove an insurer's bad faith. We must apply Michigan law in this diversity action, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); moreover, we must apply the law of Michigan as it now stands, rather than as it stood at the time this case was decided in the District Court. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). We believe that under *Medley* Progressive cannot on the evidence presented be held liable for bad faith in its failure to settle.
>
> * * *
>
> *Medley* goes beyond previous cases in its requirements to establish an insurer's bad faith.
>
> * * *
>
> The Michigan Court of Appeals reversed the trial court's judgment of bad faith. The court held that 'bad faith' under M.C.L.A. § 500.2006(4) is 'not simply negligence or bad judgment but rather the conscious doing of a wrong because of dishonest purpose or moral obliquity'."

Accordingly, the Court of Appeals reversed the trial court's judgment on the basis that Mr. Awrey was required to and did not demonstrate dishonest purpose or moral obliquity in his case against Progressive Casualty.

Intriguingly, the Court of Appeals anticipated an objection to its opinion, which was manifested in *Commercial Union Insurance Co.* v. *Liberty Mutual Insurance Co.*, 137 Mich. App. 381, 357 N.W.2d 861 (1984). The

Court of Appeals noted, Opinion at A-8, fn2, that *Medley* was decided in the context of M.C.L. 500.2006(4); M.S.A. 24.12006(4), but the Court was persuaded that the specific context was immaterial. However, in *Commercial Union, supra,* 137 Mich. App. at 391, the Michigan Court of Appeals explicitly limited the holding in *Medley* to cases arising under M.C.L. 500.2006(4); M.S.A. 24.12006(4). Thus, the Court of Appeals clearly erred in applying *Medley* to this case. However, there is a far more fundamental flaw in the Court of Appeals' decision.

The most fundamental flaw in the Court of Appeals' decision is that the Court relied on a case without precedential weight. At the time the Court released its opinion relying on *Medley,* an application for leave to appeal had been filed with the Michigan Supreme Court. Thus, *Medley* had no precedential weight. In *People* v. *George,* 399 Mich. 638, 250 N.W.2d 491 (1977), the Michigan Supreme Court explained that a Michigan Court of Appeals decision is not a final adjudication, if a party files a timely application with the Michigan Supreme Court. The Court noted, 399 Mich at 639-640:

> "The application to this Court was timely, having been filed within 20 days of the issuance of the Court of Appeals opinion. See GCR 1963, 853.2(1). That application to this Court has been neither denied nor granted and therefore remains pending before this Court.
>
> * * *
>
> The clerk of the Court of Appeals was also obliged to send *notice* to counsel for each party of *entry* of that order of the Court of Appeals. GCR 1963, 853.2(1). That judgment order has *not* been *issued* because a timely application for leave to

> appeal from the judgment order of the Court of Appeals was filed with this Court by the plaintiff-appellant and has not yet been resolved by this Court.
>
> * * *
>
> If this Court denies the pending application for leave to appeal, the Court of Appeals judgment *then* becomes the final adjudication of this case and may be enforced in accordance with its terms, under GCR 1963, 853.2(2). To restate, if this Court denies leave to appeal, jurisdiction will *then* be revested in the circuit court by *issuance* of the Court of Appeals judgment order under GCR 1963, 812.11. If, on the other hand, this Court grants the pending application for leave to appeal, 'all jurisdiction over the cause shall thereafter be vested in the Supreme Court', GCR 1963, 853. 2(2). If this Court grants leave to appeal, jurisdiction of this case will be revested in the Court of Appeals or the circuit court on the issuance of and in accordance with the terms of any final order or judgment *issued* by this Court pursuant to its decision on the appeal granted."

Five years later, the Michigan Supreme Court confirmed the vitality of its earlier decision. *People* v. *Phillips*, 416 Mich. 63, 330 N.W.2d 366 (1982). The Court noted, 416 Mich. at 74-75:

> "It is only after application for leave to appeal to this Court is denied, or dispositive action is taken effectively approving the Court of Appeals decision, that it becomes a 'final adjudication' of that Court."

Based upon the preceding, it is clear that the Michigan Court of Appeals' decision in *Medley* had no precedential

weight, inasmuch as an application for leave to appeal had been timely filed. Moreover, the *Medley* decision *never* became a valid precedent. After the Michigan Supreme Court granted leave, the Court of Appeals' decision was not a final adjudication unless the Michigan Supreme Court took some "dispositive action * * * effectively approving the Court of Appeals decision * * *." *People* v. *Phillips*, *supra*, 416 Mich. at 74-75. The Michigan Supreme Court never affirmed the Michigan Court of Appeals; it did not take any other dispositive action to effectively approve the Court of Appeals' decision. Accordingly, the Michigan Court of Appeals' decision was and is entirely without precedential authority.

In a slightly different context, *Riley* v. *Northland Geriatric Center*, 140 Mich. App. 72, 362 N.W.2d 894 (1985), establishes that a stipulated dismissal — as in this case — does *not* reinstate a previous opinion. In *Riley*, the Michigan Court of Appeals was required to determine whether the Michigan Supreme Court decision, *Gusler* v. *Fairview Tubular Products*, 412 Mich. 270, 315 N.W.2d 388 (1981), was a precedential ruling. After the Michigan Supreme Court had released *Gusler*, the Michigan Supreme Court granted a motion for rehearing. Prior to the rehearing, however, the parties stipulated to a dismissal of the appeal. The Michigan Court of Appeals, in *Riley*, held that *Gusler* had no precedential value. The Court explained, *Riley*, *supra*, 140 Mich. App. at 76-77:

> "In other words, if a motion for rehearing is timely filed, the order or judgment previously entered by the clerk does not 'issue' or become effective until after the motion is decided one way or the other. Here, as a motion for rehearing was filed within 20 days of the filing or 'entry' of the Supreme Court's *Gusler* opinion, GCR 1963,

> 864.4(a), and as the motion was subsequently granted, the *Gusler* opinion was never 'issued' in conformity with the court rules.
>
> The subsequent dismissal of the appeal by the Court upon stipulation of the parties does not somehow work to 'issue' the Court's order or judgment."

Riley further establishes that the Court of Appeals erroneously relied on *Medley*. Leave having been granted, the lower appellate court's opinion had no precedential authority without the imprimatur of the Michigan Supreme Court. This rule is not obviated by a stipulated dismissal of the appeal. Rather, the dismissal of the appeal negates the possibility that the lower court's opinion will be authoritative. After the dismissal, the Michigan Supreme Court will not *issue* an order affirming or reversing the lower court. The lower court's opinion *cannot issue*, because the Michigan Supreme Court will not have issued an order revesting the Michigan Court of Appeals with jurisdiction, the case having been dismissed. This procedure is unequivocal.

Thus, *Medley*, upon which the Court of Appeals relied, was no precedent. Since the Court of Appeals unambiguously stated that the trial court committed no error, given the state of the law prior to *Medley*, the reversal of the trial court is manifest error. That error transcends the facts of this case. That error reflects a total failure to carefully scrutinize Michigan's law on what constitutes precedential authority. That error can and should be corrected, thereby giving direction to the federal bench, that the lower courts must be sensitive to this issue.

RELIEF

Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK

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Dated: August 28, 1985

APPENDIX

• • •

JUDGMENT

(United States Court of Appeals for the Sixth Circuit)

(Filed February 28, 1984)

(NORMAN EUGENE AWREY, Plaintiff-Appellee, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, Defendant-Appellant — No. 82-1363)

Before: KEITH and KENNEDY, Circuit Judges;
and GIBSON, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed as to the denial of Progressive's motion for judgment notwithstanding the verdict and it is further held that the evidence was insufficient as a matter of law for the jury to conclude that Progressive acted in bad faith.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

Issued as Mandate: June 11, 1985 Costs: None

(Certification Omitted)

ORDER

(United States Court of Appeals for the Sixth Circuit)

(Filed June 3, 1985)

(NORMAN EUGENE AWREY, Plaintiff-Appellee, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, Defendant-Appellant — No. 82-1363)

Before: KEITH and KENNEDY, Circuit Judges;
and GIBSON, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by appellee, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED, that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

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* Honorable Floyd R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed February 28, 1984)

(NORMAN EUGENE AWREY, Plaintiff-Appellee, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, Defendant-Appellant — No. 82-1363; ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.)

Before: KEITH and KENNEDY, Circuit Judges; GIBSON, Senior Circuit Judge.*

KENNEDY, Circuit Judge.

Defendant-Appellant Progressive Casualty Insurance Company (Progressive) appeals from a verdict in favor of plaintiff-appellee Norman Awrey (Awrey). Awrey had alleged that Progressive had acted in bad faith in failing to offer policy limits to settle a tort action against Awrey at a time when it could have been settled for that amount, and consequently had exposed him to liability in excess of his insurance policy limits. Progressive denied acting in bad faith. It is argued that its failure to settle was based on an honest belief that the tort action was not worth policy limits and that the claim could have been settled for less than policy limits.

Progressive did offer policy limits plus interest and costs during trial of that earlier tort action. This offer was refused by the injured party and a verdict of $175,000.00 was returned against Awrey. Progressive paid

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* Honorable Floyd R. Gibson, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

the policy limits of $20,000.00, plus interest on that amount and costs. Awrey has a judgment outstanding against him for the excess. Awrey has no assets, no house, no car, no bank account, and no job.

Awrey instituted this suit against Progressive for the amount of the excess liability in the prior litigation, alleging bad faith in Progressive's failure to settle. The jury returned a verdict for Awrey. On March 23, 1982, the District Court entered a judgment for Awrey in the amount of $213,358.24, the amount of the excess liability with interest. Progressive moved for a directed verdict and a judgment notwithstanding the verdict, which were denied.

Progressive makes three arguments on appeal. First, Progressive argues that the record does not support the jury's verdict of bad faith and that judgment notwithstanding the verdict should have been granted. We agree, and consequently do not reach Progressive's other arguments, which address the measure of damages recoverable under Michigan law by an indigent plaintiff in a "bad faith failure to settle" case, and challenge the District Court judge's charge to the jury.[1] Briefly, the evidence presented to the jury on the question of bad faith was as follows.

Awrey was insured for automobile liability through Progressive with policy limits of $20,000.00. On November 2, 1975, he was involved in an automobile accident with one Roger Huston. Huston sustained injuries to his hip, knee and ankle. He sued Awrey for damages in the Ogemaw County, Michigan, Circuit Court in October of

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[1] Awrey argues that Progressive had not preserved these issues for appeal. Because we hold that there was insufficient evidence of Progressive's bad faith we do not decide whether they were preserved for review.

1977. Progressive retained Robert Hetzler, an attorney in Bay City, Michigan, to represent Awrey. Progressive at that time advised Awrey, by letter, of his right to hire his own attorney, and Awrey declined to do so. On November 4, 1977, Hetzler received a file on the Huston-Awrey litigation. From this file he learned that Awrey had consumed a number of Valium pills, that he had been drinking, and that before the accident he had said that he was going to "pile his car up." Hetzler also received a police report which indicated that Awrey had crossed the center line before the accident occurred. Hetzler took Houston's deposition in August, 1978, and learned that Huston would attempt to relate a heart condition to the accident. In October, 1978, Hetzler received Huston's hospital records and reviewed depositions of several doctors who had examined Huston. Based on these documents Hetzler concluded that Huston did not have sufficient evidence to link the heart condition to the accident.

Hetzler requested a settlement demand from Huston's attorney, Sheldon Miller, on November 1, 1978. Miller replied on November 10, that he would accept the limits of Awrey's policy with Progressive, *i.e.*, $20,000.00, but that this offer would remain open for only thirty days. Miller withdrew his offer in a letter to Hetzler dated December 27, 1978.

In early January, 1979, Hetzler recommended to Progressive that it offer Huston the policy limits of $20,000.00. Progressive wrote to the Awreys in January 1979, notifying them that Huston had demanded policy limits, but that Progressive planned to offer less than policy limits. Progressive did not disclose to the Awreys that Hetzler had recommended offering policy limits. The Awreys testified that they did not receive this letter. Progressive claims that it did not offer Huston the policy limits

because a senior partner in Hetzler's firm and four attorneys at Progressive believed the suit was not worth $20,000.00 because Huston's heart condition could not be related to the accident.

Progressive extended settlement authority to Hetzler for up to $15,000.00. On January 30, 1979, Hetzler made a settlement offer of $12,000.00 to an attorney at Miller's firm. On February 13, 1979, the attorney from Miller's firm called Hetzler to tell him that the case could still be settled for the policy limits.

The case was tried in March, 1979. After opening statements at trial Hetzler offered $20,000.00, the policy limits, plus interest and costs. Huston's attorney responded with a demand for $25,000.00, which Progressive refused without communicating it to Awrey. Progressive says that it refused this counteroffer because it knew that Awrey himself had no assets with which to pay the difference between the $20,000.00 policy limits plus interest (approximately $23,000.00) and the $25,000.00. Awrey on Hetzler's advice then admitted liability, as a trial tactic to avoid having the jury hear evidence of Awrey's consumption of alcohol and Valium prior to the accident. The only issue for trial was the amount of Huston's damages. The jury returned an award of $175,000.00. A motion for a new trial alleging that the verdict was excessive was denied. No appeal was taken.

Awrey then brought this action against Progressive, alleging Progressive's bad faith in failing to settle the Huston litigation. We conclude that the evidence was insufficient to sustain the jury's verdict of bad faith and a judgment notwithstanding the verdict should have been granted.

In reversing the District Court, we do not hold that the trial judge committed error in denying Progressive a judgment notwithstanding the verdict. After the District Court's decision was entered, the Michigan Court of Appeals decided the case of *Medley* v. *Canady*, 126 Mich. App. 739, 337 N.W.2d 909 (1983), clarifying what is required to prove an insurer's bad faith. We must apply Michigan law in this diversity action, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); moreover we must apply the law of Michigan as it now stands, rather than as it stood at the time this case was decided in the District Court. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). We believe that under *Medley* Progressive cannot on the evidence presented be held liable for bad faith in its failure to settle.

The seminal case in Michigan law on an insurer's liability for failure to settle is *City of Wakefield* v. *Globe Indemnity Co.*, 246 Mich. 645, 225 N.W. 643 (1929). The court in *Wakefield* held that an insurer is liable to its insured for a judgment in excess of liability if the insurer acted in bad faith in failing to settle the case against the insured. Since *Wakefield*, courts have had the task of determining what constitutes "bad faith" on the part of an insurer. *See Valentine* v. *Liberty Mutual Insurance Co.*, 620 F.2d 583 (6th Cir. 1980); *Transport Insurance Co.* v. *Michigan Mutual Liability Insurance Co.*, 496 F.2d 265 (6th Cir. 1974); *Jackson* v. *St. Paul-Mercury Indemnity Co.*, 339 F.2d 40 (6th Cir. 1964); *McCoy* v. *Zurich Insurance Co.*, 509 F. Supp. 1106 (E.D. Mich. 1981), *aff'd*, 703 F.2d 564 (6th Cir. 1982); *Jones* v. *National Emblem Insurance Co.*, 436 F. Supp. 1119 (E.D. Mich. 1977); *Perlmutter* v. *Whitney*, 60 Mich. App. 268 (1975).

Medley goes beyond previous cases in its requirements to establish an insurer's bad faith. *Medley* involved a suit by an insured against his insurer for bad faith failure to

pay an undisputed claim under M.C.L.A. § 500.2006(4).[2] The trial judge in *Medley* had held that the actions of the insurer "were a classic example of what bad faith refusal to pay amounts to in its most rudimentary definition." 337 N.W.2d at 912. The court had cited the following acts which it believed supported a finding of bad faith: (1) failure to properly evaluate the seriousness of the police report; (2) failure to determine the extent of plaintiff's injuries; (3) conducting no further investigation after receiving the complaint; (4) failing to send for hospital records after notice of the claimed injury; (5) not offering to pay policy limits after receiving plaintiff's interrogatories; (6) failing to respond to plaintiff's demand letter; (7) misplacing the files; and (8) failing to consult with its in-home committee for approval of payment of plaintiff's demand. *Id.*

The Michigan Court of Appeals reversed the trial court's judgment of bad faith. The court held that "bad faith" under M.C.L.A. § 500.2006(4) is "not simply negligence or bad judgment but rather the conscious doing of a wrong because of dishonest purpose or moral obliquity." 337 N.W.2d at 913. The court stated:

> We fail to find a bad faith refusal to pay on the part of [the insurer] on these stipulated facts. They demonstrate that [the insurer] may have been negligent in failing to promptly respond [to the demand letter]. However, there is no evidence of conscious doing of wrong to plaintiff as a result of dishonest purpose or moral obliquity.
>
> *Id.*

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[2] We recognize that *Medley* is not a case of bad faith in failure to settle, as the instant case is. However, we see no basis for a distinction between the standard of proof for an insurer's bad faith in the context of failure to settle, and failure to pay an uncontested claim under M.C.L.A. § 500.2006(4). The Michigan Court of Appeals appears to have considered them the same.

The evidence of the insurer's bad faith in *Medley* and in the instant case is quite similar. In its opinion denying Progressive's motion for a directed verdict the District Court gave the following examples of evidence which it said could substantiate a verdict of Progressive's bad faith.

(1) Hetzler had evidence that Awrey had been drinking and had taken Valium before the accident with Huston and was on the wrong side of the road when the accident occurred. Hetzler did not meet with Awrey before trial to discuss his position that he was not responsible for the accident. Hetzler knew that Awrey based this claim solely on his failure to remember the accident. These facts, said the judge, could lead the jury to the conclusion that Progressive "ignored completely" Awrey's interests in failing to persuade Awrey to admit liability prior to trial.

(2) Progressive rejected a settlement offer of $25,000.00 at trial, $5,000.00 over limits, because, according to Progressive, it knew that Awrey had no assets to pay the approximately $2,000.00 excess over the $20,000.00 policy limits plus interest. Progressive did not inform Awrey of this offer. Other evidence in the record indicated that Awrey had paid off a prior judgment by making monthly installments. The judge found that these facts supported an inference that Progressive "did not consider plaintiff's position when an offer in excess of policy limits was made."

(3) Progressive wrote Awrey two letters describing the progress of the tort suit and telling him that he had the right to hire his own attorney. Progressive never informed Awrey of the specifics of any settlement

offers,[3] and Hetzler had Progressive communicate directly with Awrey because Hetzler disagreed with the course of action that Progressive was taking. Progressive did not tell Awrey that Hetzler had recommended settling with Huston for policy limits. The court found that this evidence supported an inference that Progressive purposely withheld information that Awrey needed to protect his rights.

The evidence the trial judge described in his example (1) closely parallels the failure of the insurer in *Medley* to evaluate properly the seriousness of the police report, to determine the extent of the plaintiff's injuries, and to conduct further investigation after receiving the complaint. Under *Medley*, these actions alone do not support a finding of bad faith. Further, Mr. Hetzler explained that he hoped to make something of Mrs. Awrey's previous statement that Huston had his lights on bright. That he exercised poor judgment in delaying the admission of liability until after opening statements in view of the very prejudicial evidence of Awrey's drinking, etc. does not rise to bad faith.

In the second example, the trial court concludes that the evidence supported an inference that Progressive did not consider Awrey's position when it did not inform Awrey of the $25,000.00 offer to which he would have been required to contribute. Mr. Hetzler testified that he

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[3] This was a contested issue at trial. A letter of January 29, 1979 appears in the record in which Progressive informed the Awreys of Huston's initial settlement demand of policy limits and of plaintiff's intention to offer less than policy limits. Awrey testified that he never received this letter. Transcript Vol. II at 497. Huston's attorney continued to insist on policy limits for settlement until trial, when he asked for $5,000.00 above policy limits. Thus, Huston's attorney apparently made two settlement offers, one for policy limits, of which Progressive insists that it informed Awrey, and one for over policy limits made at trial, covered in the trial judge's example (2).

did not convey the offer to Awrey because he knew he was unemployed and had no assets. Awrey's circumstances had changed since he had paid off the earlier judgment. Awrey had previously been employed and had owned a car. It was uncontested that Awrey had no job and no assets with which to pay off a judgment at the time of trial. Moreover, there was no evidence that Hetzler knew of the earlier claim which was paid in installments. It may well be that Hetzler ought to have thought of periodic payments as an alternative method of making up the shortfall but he did not. His failure to do so is not bad faith as defined in *Medley*. We cannot find anything in the record indicating that Progressive's failure to inform Awrey of the $25,000.00 offer was due to any conscious doing of wrong. Progressive did not benefit from the failure to make up the difference in periodic payments. Rather, it incurred additional legal fees by completing the trial.

In its third example the trial court apparently found that the failure to communicate the difference of opinion as to the value of the claim was evidence that Progressive acted in bad faith. We do not understand the trial court to have found that the failure to follow Hetzler's advice could be found by the jury to be bad faith. In view of Progressive's explanation that it relied upon its in-house counsel, as well as Hetzler's senior partner's evaluations, there is no basis for such a finding. That those evaluations were erroneous has been established by the jury's verdict against Awrey. That they were done in a negligent manner may also have been shown, but negligence is not bad faith.

The District Court's focus appears to be on the failure to advise Awrey that there was a difference of opinion between the attorney handling his case and other agents of the insurance company. We do not believe an

insurance company has the obligation to advise an insured of differences of opinion among its agents or representatives. As a corporation, it acts through numerous persons and reaches a collective decision. Would a law firm be required to advise its client that one or more of its associates disagree with the advice the firm has given? We have been cited to no authority for such an obligation by either insurance company or law firm and decline to create one.[4] We do not pass

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[4] In *Wakefield*, trial counsel for the City of Wakefield had recommended acceptance of a settlement offer. He had come to the conclusion during the trial that the case was hopeless and tentatively agreed on a figure. One, Campbell, in the home office of the insurance company, instructed trial counsel to decline the settlement. A verdict was returned over policy limits. The minority would have permitted the insurance company's bad faith to go to the jury when Campbell gave no reason for refusing the settlement.

> Conceding that the record indicates that he could have had just cause for not approving the compromise, it is mere speculation, not evidence, to guess his probable reasons when having had full opportunity to disclose them on the trial, he failed to do so. Whatever of good faith may be attributed to him by such speculation is more than offset by the fact that the jury was entitled to draw the inference that, if his action had been due to unjustifiable reasons, he would have said so on the stand, and that, failing to state the reasons, he had no legitimate excuse for his action.
>
> The only evidence of the state of mind of any of defendants' agents was that of Mr. Burritt [trial attorney], whose opinion it was that Mr. Borski would surely recover, would obtain a large verdict, and that settlement was advisiable and the amount reasonable.

246 Mich. 654-55 (1929).

The majority of the court, however, held that a directed verdict for defendant insurance company was proper. It held that until the insured submitted proof of bad faith no obligation rested on Campbell to deny that he acted in bad faith. Campbell had been required to make a quick decision on whether to accept the settlement. The majority held that in view of possible reasonable bases for his decision the jury were not entitled to draw the inference that he did not exercise an honest judgment or act in good faith in refusing to accept the offer made. Disagreement with trial counsel was not sufficient to permit the jury to find bad faith.

upon whether there is a personal obligation on the part of insured's counsel which arises out of his dual role as attorney for the insured as well as for the insurance company, to advise his client of his opinion. That was not a basis of the instant action for bad faith on the part of Progressive.

With respect to the trial judge's example (3), we fail to see how Progressive's action of advising Awrey of his right to hire his own attorney supports an inference that Progressive purposely withheld information that Awrey needed to protect his rights. Progressive rather exhorted Awrey to protect his rights. Progressive failed to tell Awrey that Hetzler had recommended paying policy limits. This may have been negligent, it may have been poor judgment, but we cannot say that under *Medley* this supports a finding of bad faith.

Under *Medley*, it is not enough to show that the insurer "ignored completely" and "did not consider" the insured's position in order to prove bad faith on the part of the insurer. *Medley* requires a showing that the insured engaged in the "conscious doing of wrong because of dishonest purpose or moral obliquity" for a finding of bad faith. 337 N.W.2d at 912. We find, comparing the evidence in *Medley* and in this case, that the evidence presented here — while it may support a claim of negligence against Progressive — is not sufficient to show a dishonest purpose or moral obliquity.

Accordingly, we reverse the judgment of the District Court denying Progressive's motion for a judgment notwithstanding the verdict and hold that the evidence was insufficient as a matter of law for the jury to conclude that Progressive acted in bad faith.

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated April 21, 1982)

(NORMAN EUGENE AWREY, Plaintiff, vs. PROGRESSIVE CASUALTY INSURANCE COMPANY, a foreign corporation, Defendant — CIVIL NO. 80-72252)

This matter is before the court on defendant's motion for judgment notwithstanding the verdict or for a new trial. The court has reviewed the motion and brief filed in support thereof and, in accordance with the Opinion issued this date,

IT IS ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict or For New Trial be, and hereby is, DENIED.

/s/ Ralph B. Guy, Jr.
United States District Judge

Dated: April 21, 1982

(Certification Omitted)

OPINION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated April 21, 1982)

(NORMAN EUGENE AWREY, Plaintiff, vs. PROGRESSIVE CASUALTY INSURANCE COMPANY, a foreign corporation, Defendant — CIVIL NO. 80-72252)

Defendant's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial arises out of a jury verdict in favor of the plaintiff. In his complaint, plaintiff alleged that defendant insurance company had exposed plaintiff to liability in a prior tort action, in which case plaintiff was the defendant, because of defendant's bad faith refusal to settle the tort action at policy limits. Defendant responded that its refusal to settle was not made in bad faith but on the basis of its honest belief that the underlying suit was not worth policy limits. Following the court's denial of cross motions for summary judgment, the parties proceeded to trial and the case was ultimately submitted to a jury for resolution. Because the parties agreed that the amount of damages was equal to the difference between the verdict in the underlying action and the amount of the policy limits, only the question of liability was submitted. After seven days of deliberation, the jury returned a verdict in favor of plaintiff.

The issue raised by a motion of a judgment n.o.v. is whether there is sufficient evidence to raise a question of fact for the jury. *O'Neill* v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). Because the grant of the motion would deprive a litigant of the opportunity to have factual

disputes resolved by a jury, the motion must be cautiously and sparingly granted. *Lee* v. *Joseph E. Seagram & Sons, Inc.*, 413 F. Supp. 693 (S.D. N.Y. 1976), *aff'd*, 552 F.2d 447 (2nd Cir. 1977). Accordingly, the standard to be applied in determining the propriety of granting or denying a judgment n.o.v. is whether the evidence is such, without weighing the credibility of the witnesses or considering the weight of the evidence, that reasonable men could come to but one conclusion. *Coffy* v. *Multi-County Narcotics Bureau*, 600 F.2d 570 (6th Cir. 1979); *Morelock* v. *NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978). Moreover, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. *Id.*

Applying that standard to the present action, the court concludes that the question of bad faith was properly submitted to the jury. To illustrate the basis of its conclusion, the court need only review the evidence relied on by defendant in the present motion. In its motion for judgment n.o.v., the defendant lists approximately sixteen acts or documents which it contends conclusively establish that the defendant did not act in bad faith. For example, defendant contends that the reason for the trial attorney's refusal to admit liability in the underlying action was Mr. Awrey's refusal to admit same prior to trial. Also in the record, however, was evidence indicating that the trial attorney had police reports which noted that plaintiff had been drinking and taking pills prior to the accident as well as being on the wrong side of the road when the collision occurred, that the trial attorney failed to meet with the plaintiff prior to trial to discuss plaintiff's claim of no liability, and that the trial attorney knew that plaintiff based his denial of liability solely on an inability to remember the accident or the events leading to same. Such facts could lead a reasonable

man to conclude either that the defendant relied completely on plaintiff's statements in refusing to admit liability for the accident or ignored completely the plaintiff's interests in failing to persuade plaintiff to admit same prior to trial.

As another example, defendant contends that it refused to accept a settlement offer that exceeded the policy limits by $5,000.00 because it knew that plaintiff had no funds to contribute towards a settlement. Other evidence in the record, however, indicates that plaintiff had in fact paid off a prior judgment by making monthly installments, that defendant knew that plaintiff's potential exposure for liability above its policy limits was significant, and that defendant did not inform plaintiff of this offer. Such evidence again could lead a reasonable man to conclude either that the defendant refused the offer only after considering the plaintiff's economic condition or because it did not consider plaintiff's position when an offer in excess of policy limits was made.

As a final example, defendant produces two letters which were directed to plaintiff indicating the progress of the tort action and informing plaintiff that he had the right to hire his own attorney. Such documents, however, also corroborate the trial attorney's testimony that he requested that defendant communicate directly with plaintiff as he refused to do so because he did not agree with the cause of action being followed by the insurance company. Further, plaintiff was never informed of the specifics of any settlement offer, and that the plaintiff was never informed that the trial attorney prior to trial had recommended that defendant settle the case at policy limits. Such evidence again supports two inferences. Those being that the letters were intended to avoid informing plaintiff of the specific information that he needed to adequately protect his rights.

Without reviewing the remainder of the record, the court believes that the above examples adequately illustrate the nature of the proofs offered at trial. In short, the evidence presented two theories which could explain the defendant's actions in the underlying suit. Defendant's theory was that it acted in the honest belief that the tort claim was worth less than the policy limits, that plaintiff was adamant about not admitting liability, and that plaintiff was unable to contribute to any settlement of the action. Plaintiff's theory was that the defendant acted in bad faith as was illustrated by the defendant's rejection of the trial attorney's recommendation that it offer policy limits prior to trial, the trial attorney's failure to meet with plaintiff, and the defendant's failure to communicate the substance of any settlement offers to plaintiff. Because the court concludes that a reasonable man could accept either of these theories, it must deny defendant's motion for a judgment notwithstanding the verdict.

The issue raised by a motion for a new trial is essentially one of judicial discretion. *Mooney* v. *Henderson Portion Pack Co.*, 339 F.2d 64 (6th Cir. 1964). The judge's duty is primarily to see that there is no miscarriage of justice. *Bevevino* v. *Saydjari*, 574 F.2d 676 (2nd Cir. 1978). Defendant's motion for a new trial is based on three grounds. First, defendant contends that there was judicial error in the admission of evidence of activity which was not and could not be construed as evidence of bad faith. Second, defendant contends that there was judicial error in the instructions to the jury defining bad faith. Third, defendant contends that the verdict was against the weight of evidence.

Defendant's first argument is that it was prejudiced by the introduction of evidence that could not be construed as evidence of bad faith. Although not explicit in

defendant's motion, defendant apparently contends that it was prejudiced by the introduction of evidence concerning the tactics of the trial attorney in the underlying tort action. In considering this argument, the court would initially note that defendant did not object to the introduction of this evidence at trial. Even where the admission of evidence is erroneous, courts have generally refused to allow a new trial where counsel did not seasonably object to the allegedly improper ruling. *See, e.g., Peterson* v. *Calmar Steamship Corp.*, 296 F. Supp. 8 (E.D. Pa. 1969).

Assuming that an appropriate objection had been made, the court's conclusion that a new trial is unnecessary would be unchanged. In essence, defendant contends that the evidence concerning the tactics employed by the trial attorney was irrelevant to a determination of bad faith. Because defendant is a corporation, however, the defendant's good or bad faith could only be determined by examining both the actions and the states of mind of its various agents. *Wakefield* v. *Globe Indemnity Co.*, 246 Mich. 645 (1929). One such agent was the trial attorney hired by the defendant to defend the insured in the underlying tort action. Because the actions and motives behind the actions of the trial attorney would have a substantial tendency to make the existence of bad faith on the part of the defendant more or less probable, Fed.R.Evid. 401, the court finds that such evidence was relevant to the jury's ultimate determination in this action. In addition, even if the admission of such evidence was improper, the court further concludes that such error would not be grounds for a new trial as defendant was not prejudiced by the introduction of such evidence because there was no testimony that the trial attorney's conduct was in violation of the standard practice for a trial attorney. Fed.R.Civ.P. 61.

Defendant's next argument is that there was judicial error in the instructions to the jury defining bad faith. In this regard, defendant contends that the court implied to the jury that it believed that the defendant acted in bad faith when it instructed the jury that an insurance company "should not abuse the power vested in it and recklessly and contumaciously refuse to settle if it is apparent that in all reasonable probability its conduct would not only result in damage to its insured but also in loss to itself."

To explain the genesis of this instruction, it is necessary to begin with the parties' requested instructions relative to bad faith. In his request, plaintiff requested an instruction enumerating the duties adopted by the court in *Jones* v. *National Emblem Insurance Co.*, 436 F. Supp. 1119 (E.D. Mich. 1977). Based on a Second Circuit decision, the court in *Jones* listed four factors which could support a finding of bad faith on the part of an insurer. Defendant objected to the use of a list of factors indicating bad faith and suggested that the court give the definition of bad faith provided by the Michigan Supreme Court in *Wakefield* v. *Globe Indemnity Co., supra.* In the alternative, defendant suggested that any list of factors for the jury's consideration of bad faith should be rephrased to state factors indicating that the defendant acted in good faith.

Although the court initially indicated that it intended to use a list approach similar to that used by the court in *Jones*, the court subsequently reversed its position and gave the instruction to which defendant now objects. It reached this decision for several reasons. First, it was concerned with the potential prejudice which arises any time a jury is given a list of factors to consider in making a determination. Even where a jury is cautioned to consider the enumerated factors along with all other

evidence presented at trial, there is always the danger that a jury will consider only those factors listed by the judge. Second, the manner of phrasing such a list is fraught with danger. If the court follows the *Jones* case and phrases the list in terms of bad faith, then the defendant may be prejudiced by the court's failure to indicate factors showing good faith. If the court phrases the list in terms of good faith, then the defendant may also be prejudiced as the jury might interpret such instructions as placing the burden on the defendant to establish good faith which is contrary to the law. Third, the rationale of *Jones* was drawn into question by the subsequent decision of the Sixth Circuit in *Valentine* v. *Liberty Mutual Insurance Co.*, 620 F.2d 583 (6th Cir. 1980). Although the court in *Valentine* cited the *Jones* decision, it did not consider the *Jones* list when it ruled that the insurance company had not acted in bad faith when it failed to inform the excess insurer of increases in its insured's ad damnum clauses.

Because of the court's decision not to use a list approach, the court was left with only one means of instructing the jury on the concept of bad faith. That means was the manner initially requested by the defendant which defined bad faith with the exact language used by the Michigan Supreme Court in *Wakefield* v. *Globe Indemnity Co., supra,* — the very case recognized as the leading Michigan case by the Sixth Circuit in *Valentine* v. *Liberty Mutual Insurance Co., supra.* In addition, to avoid any possible prejudice resulting from the listing of factors to consider in determining bad faith in the *Wakefield* quotation or the attorneys' use of duties or non-duties of an insurance company in their closing arguments, the court twice cautioned the jury to consider the entire record in determining whether the defendant acted in bad faith. First, it noted: "[i]n your

consideration of this question of bad faith, you are not to single out any one act or alleged duty or non-duty standing alone, but you are to consider the conduct of the parties as a whole in reaching your determination on this question of bad faith." Second, the court cautioned:

> The foregoing examples are not intended to be all inclusive and are meant to be suggestive only. There is no intent by these illustrations to limit your consideration of all relevant evidence. None of the above examples or considerations, either individually or collectively, is necessarily determinative of the issue of bad faith but may be considered by you in making your own determination.

Because the court finds that the above instructions to the jury did not imply that the court had previously determined that defendant had acted in bad faith and that no miscarriage of justice occurred as a result of the giving of those instructions, the court concludes that the giving of such instructions, when read as a whole, does not provide a ground for the granting of defendant's motion for a new trial.*

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* Defendant also objects to the fact that the instructions do not inform the jury that bad faith is like fraud. The initial answer to this objection is that all the cases cited by defendant speak of bad faith and fraud in the disjunctive. Thus, the court interprets the language of these cases to indicate two separate motives which could make an insurance company liable for failing to settle a case. Moreover, the definition of bad faith was taken directly from *Wakefield* v. *Globe Indemnity Co.*, 246 Mich. 645 (1929). Therefore, the court concludes that the jury was given a proper definition of bad faith when it was instructed that mere bad judgment or negligence does not amount to bad faith. In this regard, it is interesting to note that at least one author suggests that negligence is sufficient to find liability in Michigan. *See*, Torpey, *Liability Beyond Policy Limits*, Michigan Bar Journal (Feb. 1982).

Defendant's final argument is that the jury's finding of bad faith was contrary to the weight of the evidence. Unlike a motion for judgment n.o.v., a motion for a new trial because a verdict is against the weight of the evidence requires a court to consider not only whether a factual question was presented for the jury but whether the jury's verdict was erroneous. *Bevevino* v. *Saydjari, supra*. Because the decision of whether to grant a new trial is essentially left to the discretion of the trial court, it is not surprising that different courts have adopted varying standards to be applied by a trial court in passing on such a motion. Wright & Miller, *Federal Practice and Procedure* § 2806 at 45. In this regard, the court believes that the standard set forth in 6A *Moore's Federal Practice* ¶ 59.08[5] at 59-160 to 59-161, and adopted by the Second Circuit in *Bevevino* v. *Saydjari, supra*, properly indicates those factors which a trial court should consider in ruling on a motion for new trial because the verdict is contrary to the weight of the evidence. That standard provides:

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been, then it is his duty to set the verdict aside; otherwise not.

Applying that standard to the present case, the court initially notes that the question of bad faith generally is one for the jury to decide. *Wakefield* v. *Globe Indemnity*

Co., supra. Moreover, the evidence presented at trial was not complex and for the most part was uncontradicted. In essence, the jury was asked to determine whether the defendant's refusal to settle the case prior to trial was based upon an honest belief that the suit was not worth policy limits or upon an indifference to the effect of the refusal on the insured. Given that the jury deliberated on this question for seven days, the court does not believe that the jury reached a clearly erroneous result.

Therefore, the court must abstain from interfering with the verdict and deny the defendant's motion for new trial because the verdict was against the weight of the evidence.

/s/ Ralph B. Guy, Jr.
United States District Judge

Dated: April 21, 1982

(Certification Omitted)

ORDER OF JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated March 23, 1982)

(NORMAN EUGENE AWREY, Plaintiff, vs. PROGRESSIVE CASUALTY INSURANCE COMPANY, a foreign corporation, Defendant — C. A. No. 80-72252; Hon. Ralph B. Guy, Jr.)

At a session of said Court held in the Courtrooms of the United States District Court, in the City of Detroit, County of Wayne, and State of Michigan, on Mar. 23, 1982.

Present: Ralph B. Guy, Jr., U.S. District Judge

This matter having come on for trial on the Courts' regular scheduled trial docket, and the matter having been heard before a Court and Jury and the Jury having deliberated and rendered its verdict in favor of Plaintiff, NORMAN EUGENE AWREY, and against the Defendant, PROGRESSIVE CASUALTY INSURANCE COMPANY, on February 5, 1982;

IT IS HEREBY ORDERED that judgment be and the same is hereby entered in favor of the Plaintiff, NORMAN EUGENE AWREY, and against Defendant, PROGRESSIVE CASUALTY INSURANCE COMPANY, in the amount of TWO HUNDRED THIRTEEN THOUSAND FIVE [*three*] HUNDRED FIFTY-EIGHT and 24/100 DOLLARS ($213,358.24), which sum includes unpaid Judgment and costs and statutory interest computed through March 1, 1982, as agreed to between the parties herein;

IT IS FURTHER ORDERED that the within Judgment shall accrue no additional interest pursuant to MCLA 600.6013 from the date of filing of the within Complaint until March 1, 1982 because the Judgment amount of $213,358.24 includes all applicable interest to the date of March 1, 1982;

IT IS FURTHER ORDERED that the Plaintiff will be submitting a Taxed Bill of Costs and will argue before this Court, said costs when approved, will be incorporated in this Judgment at the time they are approved by this Court, without the necessity of an Amendment to this Judgment by stipulation of the parties.

/s/ Ralph B. Guy, Jr.
United States District Court Judge

Approved as to form only:
By: /s/ Samuel A. Meklir
Attorney for Plaintiff
And:
By: D.J. Watters
Attorney for Defendant

(Certification Omitted)

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-402 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORMAN EUGENE AWREY,
Petitioner,

vs.

PROGRESSIVE CASUALTY INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

PLUNKETT, COONEY, RUTT, WATTERS,
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Pursuant to Supreme Court Rule 28.1, Respondent Progressive Casualty Insurance Company states the following:

Respondent herein, the Progressive Casualty Insurance Company, has a publicly traded parent corporation, Progressive Corporation. Affiliates of Respondent, Progressive Casualty Insurance Company, are as follows: Progressive Mutual Insurance Company; Progressive County Mutual Insurance Company; Greenberg Financial Services, Inc.; Progressive Investment Company; Progressive Premium Budget, Inc.; Progressive Insurance Agency, Inc.; Lakeside Insurance Agency, Inc.; Allied Insurance Agency, Inc.; Wilson-Mills Land Company; I.A.S., Inc.

No. 85-402

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORMAN EUGENE AWREY,

Petitioner,

vs.

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

Petitioner argues for the first time that the United States Court of Appeals for the Sixth Circuit labored under a "fundamental flaw", i.e., that *Medley v. Canaday,* 126 Mich. App. 739, 337 N.W.2d 909 (1983), *lv. granted* 419 Mich. 870 (1984), *appeal dismissed,* December 18, 1984, is allegedly without precedential effect. Petitioner's "flaw", however, was never argued or brought to the attention of the intermediate appellate court, despite the fact that *Medley*—announced just before oral argument—was relied upon by Respondent and the Court below. Neither Petitioner's Motion for Rehearing and/or Motion for Certification to the Michigan Supreme Court filed on March 13, 1984 in the Sixth Circuit nor Petitioner's Supplement filed January 2, 1985 raised the point of law set forth by this Petition, pp. 7-10. It has, therefore, been

waived. *United States v. New York Telephone Co.*, 326 U.S. 638 (1946).

In any event, the legal position asserted by Petitioner is insubstantial. Neither *People v. George,* 399 Mich. 638, 250 N.W.2d 491 (1977) nor *People v. Phillips,* 416 Mich. 63, 330 N.W.2d 366 (1982) establish or hold that a Michigan Court of Appeals' decision which is rendered otherwise final by dismissal of Michigan Supreme Court proceedings is stripped of its value as precedent. Indeed, the traditional Michigan rule is that a final Michigan Court of Appeals' decision is binding precedent statewide until a conflicting decision with another state Court of Appeals' panel is announced. See *In the Matter of Hague,* 412 Mich. 532, 315 N.W.2d 524, 532, *reh. den.* 413 Mich. 1106 (1982); *Tebo v. Havlik,* 418 Mich. 350, 379, 380; 343 N.W.2d 181, 192, 193, *reh. den.* 419 Mich. 1201 (1984). When the Sixth Circuit released the original opinion in this case, there were no such conflicting decisions. Even if there were, in fact, later conflicting decisions, the Sixth Circuit is free under Michigan law to follow the case that it finds most persuasive. *Tebo,* fn. 15, 343 N.W.2d at 192.

As to Petitioner's view that *Medley* is without precedential effect, the Michigan Courts do not appear to agree. Most recently, in *Sederholm v. Michigan Mutual Insurance Co.,* 142 Mich. App. 372, 397; 370 N.W.2d 357, 367 (1985) (fn. 5), the Michigan Court, in effect, conceded that the traditional Michigan insurance "bad faith" excess liability definition set forth by *Wakefield v. Globe Indemnity Co.,* 246 Mich. 645, 225 N.W. 643 (1929) had been sufficiently expanded by *Medley* to allow the defense there, as here, to argue the more difficult *Medley* "bad faith" test of "fraud, conscious dishonesty or active wrongdoing" (but avoiding deciding the *Wakefield/Medley* question on other grounds).

Finally, the frivolous nature of Petitioner's position is further made apparent by two additional observations. *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.*, 137 Mich. App. 381, 357 N.W.2d 861 (1984) and *Riley v. Northland Geriatric Center*, 140 Mich. App. 72, 362 N.W.2d 894 (1985) are, as of this writing, still pending before the Michigan Supreme Court. [The *Commercial Union* Application was in fact *granted* on June 26, 1985.] If the analysis set forth by Petition, pp. 7-10, is correct, this means that neither *Commercial Union* nor *Riley* are of any precedential effect whatsoever and, consequently, they too, can be ignored. Secondly, counsel of record for Petitioner was also counsel of record for Medley in *Medley* and it can be argued that the settlement in *Medley* was a direct attempt to neutralize unwelcome precedent, given Petitioner's argument advanced here for the first time. Michigan precedent is not so easily managed.

Under the circumstances, Respondent believes that the Petition for Writ of Certiorari should be denied as utterly without merit, together with all costs.

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DATED: September 13, 1985

FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
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No. 85-402

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORMAN EUGENE AWREY,
Petitioner,

vs.

PROGRESSIVE CASUALTY INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

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Petitioner argues for the first time that the United States Court of Appeals for the Sixth Circuit labored under a "fundamental flaw", i.e., that *Medley v. Canaday*, 126 Mich. App. 739, 337 N.W.2d 909 (1983), *lv. granted* 419 Mich. 870 (1984), *appeal dismissed*, December 18, 1984, is allegedly without precedential effect. Petitioner's "flaw", however, was never argued or brought to the attention of the intermediate appellate court, despite the fact that *Medley*—announced just before oral argument—was relied upon by Respondent and the Court below. Neither Petitioner's Motion for Rehearing and/or Motion for Certification to the Michigan Supreme Court filed on March 13, 1984 in the Sixth Circuit nor Petitioner's Supplement filed January 2, 1985 raised the point of law set forth by this Petition, pp. 7-10. It has, therefore, been

waived. *United States v. New York Telephone Co.*, 326 U.S. 638 (1946).

In any event, the legal position asserted by Petitioner is insubstantial. Neither *People v. George*, 399 Mich. 638, 250 N.W.2d 491 (1977) nor *People v. Phillips*, 416 Mich. 63, 330 N.W.2d 366 (1982) establish or hold that a Michigan Court of Appeals' decision which is rendered otherwise final by dismissal of Michigan Supreme Court proceedings is stripped of its value as precedent. Indeed, the traditional Michigan rule is that a final Michigan Court of Appeals' decision is binding precedent statewide until a conflicting decision with another state Court of Appeals' panel is announced. See *In the Matter of Hague*, 412 Mich. 532, 315 N.W.2d 524, 532, *reh. den.* 413 Mich. 1106 (1982); *Tebo v. Havlik*, 418 Mich. 350, 379, 380; 343 N.W.2d 181, 192, 193, *reh. den.* 419 Mich. 1201 (1984). When the Sixth Circuit released the original opinion in this case, there were no such conflicting decisions. Even if there were, in fact, later conflicting decisions, the Sixth Circuit is free under Michigan law to follow the case that it finds most persuasive. *Tebo*, fn. 15, 343 N.W.2d at 192.

As to Petitioner's view that *Medley* is without precedential effect, the Michigan Courts do not appear to agree. Most recently, in *Sederholm v. Michigan Mutual Insurance Co.*, 142 Mich. App. 372, 397; 370 N.W.2d 357, 367 (1985) (fn. 5), the Michigan Court, in effect, conceded that the traditional Michigan insurance "bad faith" excess liability definition set forth by *Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N.W. 643 (1929) had been sufficiently expanded by *Medley* to allow the defense there, as here, to argue the more difficult *Medley* "bad faith" test of "fraud, conscious dishonesty or active wrongdoing" (but avoiding deciding the *Wakefield/Medley* question on other grounds).

Finally, the frivolous nature of Petitioner's position is further made apparent by two additional observations. *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.*, 137 Mich. App. 381, 357 N.W.2d 861 (1984) and *Riley v. Northland Geriatric Center*, 140 Mich. App. 72, 362 N.W.2d 894 (1985) are, as of this writing, still pending before the Michigan Supreme Court. [The *Commercial Union* Application was in fact *granted* on June 26, 1985.] If the analysis set forth by Petition, pp. 7-10, is correct, this means that neither *Commercial Union* nor *Riley* are of any precedential effect whatsoever and, consequently, they too, can be ignored. Secondly, counsel of record for Petitioner was also counsel of record for Medley in *Medley* and it can be argued that the settlement in *Medley* was a direct attempt to neutralize unwelcome precedent, given Petitioner's argument advanced here for the first time. Michigan precedent is not so easily managed.

Under the circumstances, Respondent believes that the Petition for Writ of Certiorari should be denied as utterly without merit, together with all costs.

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